

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

BOBBI McCLIMANS,	)	
	)	
Claimant,	)	<b>IC 2004-507936</b>
	)	<b>IC 2005-506274</b>
v.	)	
	)	
S&G PRODUCE, INC.,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
Employer,	)	<b>AND RECOMMENDATION</b>
	)	
and	)	Filed July 27, 2007
	)	
IDAHO STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on July 18, 2006. Claimant, Bobbi McClimans, was present and represented by Dennis R. Petersen of Idaho Falls. Defendant Employer, S&G Produce, Inc. (S&G), and Defendant Surety, Idaho State Insurance Fund, were represented by Steven R. Fuller of Preston. The parties presented oral and documentary evidence. This matter was then continued for post-hearing depositions and briefing. The matter subsequently came under advisement on March 6, 2007.

**ISSUES**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

The issues to be resolved are:

1. Whether Claimant suffers from a compensable occupational disease of basilar osteoarthritis;
2. Whether Claimant's claim is barred by Nycum v. Triangle Dairy and/or Nelson v. Ponsness Warren;
3. Whether Claimant's claim is barred by Idaho Code §§ 72-701, 72-706 or 72-448;
4. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
5. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care
  - b. Temporary partial and/or temporary total disability benefits
  - c. Permanent partial impairment
  - d. Disability in excess of impairment, and
6. Whether the Commission should retain jurisdiction beyond the statute of limitations.

### **ARGUMENTS OF THE PARTIES**

Claimant argues that her basilar joint arthritis and her recurrent carpal tunnel syndrome are occupational diseases resulting from her employment at S&G. She asserts entitlement to medical treatment and total temporary disability benefits for her basilar joint arthritis. She also asserts entitlement to additional medical care for her recurrent bilateral carpal tunnel syndrome, or in the alternative, to 6% permanent partial impairment and 20% permanent partial disability benefits for her carpal tunnel syndrome.

Defendants assert that Claimant's basilar joint arthritis is not causally related to her work at S&G, is barred by Nelson v. Ponsness Warren, and is also time-barred by statute. They maintain that all benefits relating to her carpal tunnel syndrome from her employment at S&G have been paid,

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

and that any recurrence of carpal tunnel syndrome is not caused by her employment at S&G.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's Exhibits 1 through 22 admitted at hearing;
3. Defendants' Exhibit 1 admitted at hearing;
4. Deposition of Don Coleman, M.D., taken by Claimant on September 14, 2006; and
5. Deposition of John Howar, M.D., taken by Defendants on September 20, 2006.

All objections made during Dr. Coleman's deposition are overruled. All objections made during Dr. Howar's deposition are overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Claimant was 45 years old at the time of the hearing. She began working full-time for S&G in 1991. S&G provides prepared food commodities, including ready to eat vegetables and fruits for schools and restaurants. S&G promoted Claimant to the position of prep room supervisor in approximately 1995. Claimant's duties at S&G included cutting, peeling, chopping, washing, and bagging fresh vegetables and fruits. For the first several years she shredded and bagged about 800 pounds of lettuce each week. Throughout her employment with S&G she peeled twelve 50-pound bags of onions three times a week, cut eight 60-pound cases of peppers three times per week, peeled, cut and diced approximately 500 pounds of carrots each week, cut 700-800 pounds of cauliflower each week, and peeled ten 50-pound bags of potatoes three times per week. She also cut broccoli, celery, cantaloupe, honeydew, and watermelon.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3**

2. Claimant noticed ongoing pain in both of her wrists beginning in approximately 1995. She advised the S&G bookkeeper about her symptoms and requested wrist splints. S&G supervisor Stan Shepherd authorized S&G's payment of wrist splints for Claimant in approximately 1995. Claimant wore wrist splints thereafter from time to time.

3. Claimant worked for S&G until March 12, 2004, when she ceased working after a confrontation with her manager's son. She was earning \$10.75 per hour when she left and has never pursued further employment with S&G. Claimant had no symptoms of pain in her thumbs while working at S&G.

4. On March 24, 2004, Claimant presented to John Howar, M.D., who diagnosed bilateral carpal tunnel syndrome related to Claimant's work at S&G. Claimant filed a workers' compensation claim with S&G which was initially denied, then accepted in July 2004. Dr. Howar performed carpal tunnel release surgery in July 2004, for Claimant's right wrist, and in August 2004, for her left wrist. Defendants paid appropriate benefits for both surgeries.

5. In approximately late August 2004, Claimant noticed bilateral thumb pain. She testified that she first noted thumb pain after the bandages were removed following her carpal tunnel release surgeries. She testified she had so much tingling and numbness in her hands prior to the release surgeries that she had not previously noticed pain in her thumbs. Claimant reported her thumb pain to Dr. Howar when the bandages were removed after her release surgeries.

6. On December 3, 2004, Dr. Howar diagnosed osteoarthritis in the CMC, or basilar, joint of both of Claimant's thumbs.

7. On January 3, 2005, Claimant was having no wrist symptoms. Dr. Howar found Claimant medically stable and opined she had no permanent impairment from her bilateral carpal tunnel syndrome.

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4**

8. On March 14, 2005, Claimant filed a notice of injury for her basilar joint arthritis. This was the first time she gave S&G notice of her osteoarthritis claim.

9. Claimant began working for Thomas Cuisine Management preparing food for hospitals. She noted recurring bilateral wrist pain. Upon discovering Claimant's wrist symptoms, her new employer assigned her duties as a delivery driver.

10. On October 24, 2005, Claimant filed another Complaint against S&G for carpal tunnel syndrome.

11. At the time of hearing, Claimant continued to be employed at Thomas Cuisine Management as a food delivery driver.

12. After the hearing, Claimant was examined by Dr. Howar on September 18, 2006. He diagnosed a recurrence of Claimant's bilateral carpal tunnel syndrome.

13. Claimant is a credible witness.

### **DISCUSSION AND FURTHER FINDINGS**

14. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

15. **Basilar joint osteoarthritis.** Claimant alleges her basilar joint osteoarthritis constitutes an occupational disease for which she is entitled to compensation. The applicable Idaho Workers' Compensation Law defines an "occupational disease" as "a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment." Idaho Code § 72-102(21)(a). The law further provides that:

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5**

[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, . . . shall be entitled to compensation.

Idaho Code § 72-437.

16. “Disablement” means “the event of an employee’s becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease,” and “disability means the state of being so incapacitated.” Idaho Code § 72-102(21)(c). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) “such disease is actually incurred in the employer's employment,” and (2) for a nonacute occupational disease, where “the employee was exposed to the hazard of such disease for a period of 60 days for the same employer.” The 60-day period of exposure required by Idaho Code § 72-439 need not be a single continuous period. Jones v. Morrison-Knudsen Co., Inc., 98 Idaho 458, 567 P.2d 3 (1977).

17. Thus, under the statutory scheme, a claimant must demonstrate (1) that they were afflicted by a disease; (2) that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which they were engaged; (3) that they were exposed to the hazards of such nonacute disease for a period of 60 days with the same employer; (4) that the disease was incurred in, or arose out of and in the course of their employment, and (5) that as a consequence of such disease, they become actually and totally incapacitated from performing their work in the last occupation in which they were injuriously exposed to the hazards of such disease. In addition, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6**

Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974).

18. In the present case Defendants assert that Claimant’s basilar joint arthritis is not causally related to her employment at S&G. On December 3, 2004, Dr. Howar first diagnosed Claimant’s CMC joint osteoarthritis and recorded in his notes that it was not related to her work at S&G. Dr. Howar reaffirmed his opinion in his deposition taken September 20, 2006. Dr. Coleman, in his September 14, 2006, deposition, initially opined that Claimant’s bilateral thumb arthritis was work-related. However, when informed that Claimant had no thumb pain while working for S&G, left her employment with S&G in March 2004, and first noted thumb pain in approximately August 2004, Dr. Coleman changed his opinion and concluded that Claimant’s osteoarthritis was not causally related to her work at S&G. There is no persuasive expert medical evidence that Claimant’s osteoarthritis was caused by her employment at S&G.

19. Claimant emphasizes portions of Dr. Coleman’s testimony that Claimant’s work at S&G aggravated her pre-existing condition of basilar joint arthritis. Even accepting this assertion, under Idaho law the aggravation of a pre-existing disease is not compensable unless the aggravation is by an industrial accident. Konvalinka v. Bonneville County, 140 Idaho 477, 478-479, 95 P.3d 628, 629-630 (2004); Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994). Claimant herein repeatedly acknowledged that she suffered no industrial accident at S&G. Claimant has failed to prove that any pre-existing osteoarthritis was aggravated by an industrial accident at S&G.

20. The Referee concludes that Claimant has not proven she contracted and incurred the occupational disease of bilateral basilar joint osteoarthritis during and as a result of her work for S&G. Claimant’s claim is also barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7**

129, 879 P.2d 592 (1994). All other issues regarding Claimant's basilar joint arthritis, including claims for medical and temporary disability benefits, are moot. Her claim regarding basilar joint arthritis should be dismissed.

21. **Carpal tunnel syndrome.** Claimant asserts entitlement to further benefits for her carpal tunnel syndrome. Claimant began working for Employer in 1991. By 1995, she began experiencing wrist pain that persisted throughout the rest of her employment with S&G. Dr. Howar attributed her bilateral carpal tunnel syndrome to her work at S&G. Defendants accepted her claim for carpal tunnel syndrome and paid for bilateral release surgeries in 2004. Defendants also paid appropriate temporary disability benefits pertaining to those surgeries. By January 2005, Dr. Howar opined Claimant was medically stable and had no permanent impairment due to her carpal tunnel syndrome.

22. Claimant alleges that she is now suffering recurrent carpal tunnel syndrome relating to her employment with S&G. She bases her assertions on the recurrence of her bilateral wrist symptoms in approximately November 2005, her visit to Dr. Howar on September 18, 2006—more than 30 days after the hearing—and his post-hearing deposition testimony of September 20, 2006, regarding his findings and conclusions from her examination two days prior. When Dr. Howar examined Claimant in September 2006, he diagnosed recurrent carpal tunnel syndrome and treated her with steroid injections. During his post-hearing deposition, Dr. Howar opined Claimant's recurrent bilateral carpal tunnel syndrome is causally related to her work at S&G that caused her carpal tunnel syndrome initially.

23. Defendants cite JRP 10(E)(4) and object to the consideration of evidence of Dr. Howar's September 18, 2006, examination and causation opinion based thereon, all of which was developed post-hearing. Claimant notes that Defendants did not object at the time of

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 8**



Dr. Howar's deposition. Indeed, Defendants' counsel inquired about causation and posed the very question which elicited Dr. Howar's causation opinion based on his post-hearing examination of Claimant.

24. Nevertheless, JRP 10(E) contains no language limiting its operation to circumstances where an objection is expressed. JRP 10(E)(4) specifically forbids precisely what Claimant attempts herein. It states in relevant part:

Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing, except on a showing of good cause and order of the Commission.

JRP 10(E)(4).

25. In the present case no order was requested by any party, nor entered by the Commission, to allow the consideration of evidence developed post-hearing. Dr. Howar's post-hearing deposition testimony and opinions concerning his post-hearing examination of Claimant cannot be considered for purposes of this decision.

26. Dr. Howar found Claimant medically stable in January 2005, and opined she had no permanent impairment or restrictions. However, at hearing Claimant testified of ongoing chronic bilateral wrist pain which limited some of her activities. Claimant's testimony is credible. Furthermore, Dr. Howar testified in his post-hearing deposition that EMG studies performed by physical therapist Dave Little on June 15, 2005, showed objective evidence of carpal tunnel syndrome persisting post-surgery.

27. The Referee finds that Claimant may not be medically stable as to her bilateral carpal tunnel syndrome and thus issues of permanent impairment and disability are premature. However,

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9**

the Referee finds Claimant has not proven her entitlement to any specific additional medical treatment as of the date of hearing.

### **CONCLUSIONS OF LAW**

1. Claimant has not proven her employment at S&G caused her bilateral basilar osteoarthritis.
2. Claimant's claim for bilateral basilar osteoarthritis is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).
3. All other issues regarding Claimant's basilar joint arthritis, including claims for medical and temporary disability benefits, are moot. Her Complaint and all claims relating to basilar osteoarthritis (IC 05-506274) should be dismissed.
4. Claimant has not proven her entitlement to any specific additional medical treatment for bilateral carpal tunnel syndrome as of the date of hearing.
5. Claimant is not medically stable and thus issues of permanent impairment and permanent disability relating to her bilateral carpal tunnel syndrome are premature.
6. The Commission shall retain jurisdiction of Claimant's bilateral carpal tunnel claim.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 16<sup>th</sup> day of July, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/  
Alan Reed Taylor, Referee

ATTEST:

\_\_\_\_\_/s/  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of July, 2007, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

STEVEN R FULLER  
PO BOX 191  
PRESTON ID 83263

lbs

\_\_\_\_\_/s/

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

BOBBI McCLIMANS,	)	
	)	
Claimant,	)	<b>IC 2004-507936</b>
	)	<b>IC 2005-506274</b>
v.	)	
	)	
S&G PRODUCE, INC.,	)	
	)	
Employer,	)	<b>ORDER</b>
	)	Filed July 27, 2007
and	)	
	)	
IDAHO STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his proposed Findings of Fact and Conclusions of Law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed Findings of Fact and Conclusions of Law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has not proven her employment at S&G caused her bilateral basilar osteoarthritis.
2. Claimant's claim for bilateral basilar osteoarthritis is barred by Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994).
3. All other issues regarding Claimant's basilar joint arthritis, including claims for medical and temporary disability benefits, are moot. Her Complaint and all claims relating to basilar osteoarthritis (IC 05-506274) should be dismissed.

4. Claimant has not proven her entitlement to any specific additional medical treatment for bilateral carpal tunnel syndrome as of the date of hearing.

5. Claimant is not medically stable and thus issues of permanent impairment and permanent disability relating to her bilateral carpal tunnel syndrome are premature.

6. The Commission shall retain jurisdiction of Claimant's bilateral carpal tunnel claim.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 27<sup>th</sup> day of July, 2007.

INDUSTRIAL COMMISSION

Unavailable for Signature  
James F. Kile, Chairman

/s/  
R. D. Maynard, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on 27<sup>th</sup> day of July, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
P O BOX 1645  
IDAHO FALLS ID 83403-1645

STEVEN R FULLER  
PO BOX 191  
PRESTON ID 83263

lbs

/s/